No. 780.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

NEW HAVEN AND SHORE LINE RAILWAY COMPANY, INC.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENT IN OPPOSITION.

The Respondent taxpayer opposes the granting of the Petition for Writ of Certiorari herein, and prays that the Writ be denied.

Opinion Below.

The Memorandum Opinion of the United States Board of Tax Appeals (R. 15-16) is unreported. The opinion of the Circuit Court of Appeals (R. 105-109) is reported in 121 F. (2d) 985.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered September 19, 1941. (R. 108) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Pursuant to plan, corporate assets were bought in at equity foreclosure sale by a bondholders' committee. The property was transferred to the taxpayer, a new corporation, in return for all its capital stock which was distributed to the depositing bondholders. The question is whether the basis of the assets for computing depreciation is the same as it would be in the hands of the old corporation under Section 113 (a) (7) of the Revenue Act of 1934. The answer depends on whether the transaction constituted a "reorganization" within the definition of Section 112 (g) (1) of the Act.

Statute Involved.

Revenue Act of 1934, c. 277, 48 Stat. 680 (see Index, page 6 *post*):

Reason for Denying the Writ.

The decision of the 9th Circuit Court in the case of Bondholders Committee, Marlborough Investment Co., and Marlborough House, Inc., is not in conflict with the instant decision by the 2nd Circuit Court, for the reason that there are a number of factual differences between that case and the instant case. These factual differences are set forth as follows:

1. The facts of the *Marlborough House* case did not specifically disclose a preexisting definite plan of reorganization. In the instant case the taxpayer was the result of, and all of the related steps taken were pursuant to, a definite plan of reorganization.

2. In the *Marlborough House* case the bondholder's committee after the foreclosure sale held and operated the property and received the income therefrom, as a separate entity, before turning it over to the new corporation after the redemption period had expired. In the instant case the bondholder's committee was merely a conduit of title; at no time handling and operating the property and business.

Also there was no period of redemption. The vesting of legal title in the taxpayer required only the time necessary for the mechanics of transfer.

3. In the Marlborough House case the "bid price" of $340,425 at the foreclosure sale probably approximated the value of the property sold. The Board found that the reason for this was two-fold: "First the amount of the bid was governed to some extent by the amount of cash available for payment to the non-depositing bondholders, and, second, in the event of redemption of the property, the bondholders wish to assure themselves of adequate and fair return on their investment" (40 B. T. A. 886). But no such considerations inspired the nominal $60,000 bid price in the instant case, except possibly the amount of cash available to satisfy the dissenting bondholders if the price should be required to be paid in cash. The record however discloses that the bid price was paid by cancellation of the deposited bonds rateably reduced. Furthermore, it is shown that the property was officially appraised by Order of Court for purposes of the foreclosure sale at $121,281.50, more than twice the amount of the "bid price" (See Petitioner's Exhibit 2 paragraph 4 Record p. 88). Unlike the *Marlborough House* case the bid price here had no relation to the value of the assets at the time of foreclosure.

Summing up these distinguishing factors, it is clear that in the instant case the foreclosure sale was merely a formality, one of the mechanical steps in a corporate reorganization, but that fact is not evident in the *Marlborough House* case.

In addition to the foregoing, attention is respectfully called to the fact that the *Marlborough House* case was decided under the Revenue Act of 1932, whereas, the instant case was decided under the Revenue Act of 1934. In the Revenue Act of 1934 for the first time the definition of Reorganization, in Section 112 (g) was amplified by the inclusion therein of sub-paragraph (B), which provides in substance that a reorganization means, "(B) the acquisition

by one corporation in exchange *solely for all or a part of its voting stock* * * * of substantially all the properties of another corporation." Under the definition of reorganization in the 1932 Act, this provision did not appear, so that it was necessary for the facts to show that after acquisition of the transferred assets by a new corporation "the transferor or its stockholders or bondholders are in control of the corporation to which the assets are transferred." For this reason, it was necessary to show that either the predecessor corporation or its *stockholders* in the literal sense of the word (not bondholders who were stepped up to the position of stockholders) were in control of the corporation, within the meaning of the definition of reorganization as it existed prior to 1934.

With respect to the 9th Circuit Court Court's decision in the *Palm Springs Holding Co.* case, 119 Fed. (2d) 846, the distinguishing factor there was that the taxpayer corporation acquired the defaulted bonds from the bondholder's protective committee before the property of the predecessor corporation was foreclosed at the sheriff's sale. Furthermore that case also is governed by the reorganization definition as contained in Section 112 (i) of the Revenue Act of 1932 which does not contain the provision as set forth for the first time in Section 112 (g) (B) of the Revenue Act of 1934 upon which the 2nd Circuit Court's decision entirely relies in the instant case.

Conclusion.

Wherefore respondent prays:

That the Writ of Certiorari be denied;

In the event the Writ is granted, that this cause be consolidated for hearing with *Commissioner* v. *Palm Springs Holding Corp.*, 119 F. (2d) 846 (C. C. A. 9th), and *Commissioner* v. *Bondholders Committee, Marlborough Investment Co.*, 118 F. (2d) 511 (C. C. A. 9th), in which the Court has granted certiorari on the taxpayer's petitions (Nos. 503, 128, and 129, respectively), and in *Commissioner* v. *South-*

west Consol. Corp., 119 F. (2d) 561 (C. C. A. 5th), and *Commissioner* v. *Alabama Asphaltic Limestone Co.*, 119 F. (2d) 819 (C. C. A. 5th), in which the Court has granted certiorari on the Government's petitions (No. 286 and 328, respectively).

Respectfully submitted,

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